

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

LIBERTY MUTUAL GROUP, INC.,
As subrogee of BODGER SEEDS, LTD.,

Plaintiff,

08 CV 00223 (JSR)

- against -

ECF CASE

MEDITERRANEAN SHIPPING
COMPANY, S.A.,

Defendant.

-----X

**STATEMENT OF MATERIAL FACTS PURSUANT
TO LOCAL RULE 56.1 BY PLAINTIFF LIBERTY
MUTUAL GROUP, INC. AS SUBROGEE OF
BODGER SEEDS, LTD. IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT.**

Pursuant to Rule 56.1 of the Local Civil Rules of the United States District Court for the Southern District of New York, Plaintiff LIBERTY MUTUAL GROUP, INC., AS SUBROGEE OF BODGER SEEDS, LTD., submits the following statement of material facts as to which there are no disputes to be tried in support of its Motion for Summary Judgment.

1. Defendant Mediterranean Shipping Company, S.A. ("MSC") issued bill of lading number MSCUTA011430 on January 26, 2007 for the ocean carriage of 648 bags of flower seeds from Tanzania to Long Beach, California. (Will Aff. ¶ 6 and Will Exh. 3).¹
2. The bill of lading contains a notation that the 648 bags of flower seeds were received "CLEAN ON BOARD." (Will Aff. ¶ 6 and Will Exh. 3).

¹"Will Aff. ¶ __" refers to numbered paragraphs contained in the Affidavit in Support of Alfred J. Will sworn to on August 8, 2008. "Will Exh. __" refers to the numbered exhibits annexed to the Will Aff.

3. The 648 bags of flower seeds were stored in container number MSCU1550902 with carrier's seal number 1760518. (Will Aff. ¶ 7 and Will Exh. 3).

4. The flower seeds were shipped by Maua Arusha Ltd. ("Maua") in Tanzania. (Will Aff. ¶ 4 and Will Exh. 2 [Mbaga Aff.] at ¶ 3 and Exhibit 1 annexed thereto).²

5. The 648 bags of flower seeds had an invoice value of \$63,688.13. (Will Aff. ¶ 5 and Exh. 2 [Mbaga Aff.] and Exhibit 1 annexed thereto).

6. Container number MSCU1550902 was loaded aboard the vessel ROYAL ZANZIBAR in Tanzania. (Will Aff. ¶ 6 and Will Exh. 3 [bill of lading] and Will Exh. 4 [Vericlaim Survey] at page 3).

7. Prior to delivery to the consignee in California, container number MSCU1550902 was transloaded, at an unknown date, aboard the ILONA. (Will Aff. ¶ 6 and Will Exh. 3 [bill of lading] and Will Exh. 4 [Vericlaim Survey] at page 3).

8. When container number MSCU1550902 left Maua's possession in Tanzania, all the container's vents were open and completely unobstructed. (Will Aff. ¶ 8 and Will Exh. 2 [Mbaga Aff.] at ¶ 6]).

9. All seeds stored in container number MSCU1550902 were shipped completely dry. (Will Exh. ¶ 8 and Will Exh. 2 [Mbaga Aff.] at ¶ 5).

10. The shipment of flower seeds arrived in Long Beach, California on or about April 5, 2007. (Will Exh. 5 [Techno Marine Services Survey] at page 1).

11. Container number MSCU1550902 was delivered to the consignee, Environmental

²"Mbaga Aff." refers to the Affirmation of Angelina Mbaga executed on August 7, 2008, Ms. Mbaga is the Managing Director of the shipper, Maua Arusha, Ltd., located in Tanzania, with personal knowledge of the shipment.

Seed Producers (“ESP”), on or about April 10, 2007. (Will Exh. 5 [Techno Marine Services Survey] at page 6).

12. The 648 bags of flower seeds remained in container number MSCU1550902 for a period of not less than 75 days. (Will Exh. 5 [Techno Marine Services Survey] at page 6).

13. When container number MSCU1550902 was delivered to the consignee, the carrier’s seal was in tact. (Will Exh. 1 [Apolinar Aff.] at ¶ 4).³

14. When container number MSCU1550902 was delivered to the consignee, the vents were open and completely unobstructed. (Will Aff. ¶ 10 and Apolinar Aff. [Will Exh. 1] at ¶ 5).

15. When container number MSCU1550902 was opened, water damage to the shipment was observed. (Will Exh. 4 [Vericclaim Survey] at pages 1, 5-6, 7 and Will Exh. 5 [Techno Marine Services Survey] at pages 2, 3, 4, 5, 6).

16. MSC’s surveyor inspected container number MSCU1550902 on April 13, 2007.

17. When MSC’s surveyor inspected container number MSCU1550902 on April 13, 2007, the container was loaded with a subsequent unrelated cargo and the container was sealed. (Will Exh. 5 [Techno Marine Services Survey] at page 2).

18. MSC’s surveyor inspected the damaged flower seeds on April 17, 2007. (Will Exh. 5 [Techno Marine Services Survey] at page 3).

19. The water damage to the shipment of flower seeds occurred in transit during the ocean voyage. (Will Exh. 4 [Vericclaim Survey] at page 7 and Will Exh. 5 [Techno Marine Services Survey] at page 5).

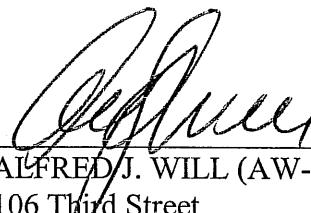
³“Apolinar Aff.” refers to the Affidavit of Joseph Apolinar dated July 24, 2008. Mr. Apolinar is a representative of ESP who has personal knowledge of the shipment.

20. Log books for the vessels ROYAL ZANZIBAR and ILONA have not been produced.
(Will Aff. ¶ 12 and Will Exh. 6).

21. Ventilation records for the vessels ROYAL ZANZIBAR and ILONA have not been produced. (Will Aff. ¶ 13 and Will Exh. 7).

Dated: Mineola, New York
August 8, 2008

BADIAK & WILL, LLP
Attorneys for Plaintiff
LIBERTY MUTUAL GROUP, INC.
AS SUBROGEE OF BODGER SEEDS, LTD.

By: 

ALFRED J. WILL (AW-2485)
106 Third Street
Mineola, New York 11501
(516) 877-2225
Our file: 07-J-011-AW/LS

Index No.: 08 Cv 00223 (JSR)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NASSAU)
SS.:)

I, Luz M. Webb, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age and reside c/o Badiak & Will, LLP, 106 3rd Street, Mineola, New York 11501-4404. On August 11, 2008 I served the within STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1 BY PLAINTIFF LIBERTY MUTUAL GROUP, INC. AS SUBROGEE OF BODGER SEEDS, LTD. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT on:

LYONS & FLOOD, LLP
Attorneys for Defendant
Mediterranean Shipping Company, S.A.
65 W. 36th Street, 7th Floor
New York, New York 10018
(212) 594-2400

by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within New York State.

Luz M. Webb

Sworn to before me this
14th day of August, 2008

Lisa A. Slayman
NOTARY PUBLIC

LISA A. SCOGNAMILLO
Notary Public, State of New York
No. 5011463
Qualified in Nassau County
Commission Expires Apr 19, 19